APPENDIX - A

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 05-3585

BETTY J. BLUE
Appelant

v.

DEFENSE LOGISTICS AGENCY
DEFENSE PERSONNEL SUPPORT CENTER
DLA/DSCP

On appeal From the United States District Court
For the Eastern District of Pennsylvania
(E. D. Pa Civ. No. 04 cv-2210)
District Judge: Honorable John P. Fullam, Sr.

Submitted Under Third Circuit LAR 34.1 (a)
May 22, 2006

BEFORE: McKEE, FUENTES and NYGAARD, CIRCUIT JUDGES

(Filed: May 24, 2006)

OPINION OF THE COURT

PER CURIAM

Betty J. Blue filed this Title VII employment discrimination action pro se, alleging that her employer, Defense Logistics Agency/Defense Personnel Support Center ("DLA/DSCP"), discriminated against her on the basis of her race and sex. At the time she filed her administrative complaint with the EEOC, Blue, who is African American, was a Contract Specialist GS-11 and had worked for DLA/DSCP for over twenty years. In her complaint, Blue alleges

that she responded to a job announcement for a Contract Specialist GS-12 in March of 1999, and that, despite her qualification, she was not selected after her interview. Blue also seeks class certification to represent 500 African American women employee of DLA/DSCP occupying positions graded as GS-6 through GS-12 applicants for the position. Blue's statistics are too general The District Court granted Appelees' motion for summary judgment, holding that Blue had failed to establish a prima facie case of discrimination under Title VII, because she presented no evidence that a non-class member in substantially similar situation were promoted. Blue filed a motion for reconsideration of that order, which the District Court's denied. Blue timely filed this appeal form both of the District Court's order, again proceeding pro se. In her brief on appeal, Blue raises four issues, which we will address in turn.

Blue's first challenges the District Court's grant of summary judgment to Appellee. Our review of the District Court's grant of summary judgment is plenary, and we apply the same legal standard used by the District Court, viewing the evidence in the light most favorable to the non moving party and drawing all reasonable inference in that party's favor. See Pacitti v. Macy's, 193 F.3d 766, 722 (3d Cir. 1999). After reviewing the record, we agree with the District Court that Blue has not made out a prima facie case of discrimination and that Appellee thus was entitled to summary judgment.

DLA/DSCP is a buying activity of the Department of Defense, which purchases clothing, medical supplies, food and other items for the United States' military worldwide.

APPENDIX-A

Title VII of the Civil Rights Act of 1964 makes it unlawful for an employer to "(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin "42 U. S. C. 2000e2(a)(1). Title VII's protections were extended to federal government employees in 1972 by passage of the Equal Employment Opportunity Act. **Title VII is the exclusive remedy for federal employees bringing employment discrimination claims.** Brown V. Gen. Services Admin. 425 U. S. 820 (1976). In order to show discrimination under Title VII, a plaintiff must first establish a prima case by a preponderance of the evidence. Texas Dept. of Community Affairs v. Burdine. 450 U. S. 248, 252-53 (1981). To establish a prima facie case for discriminatory non-promotion using indirect evidence, a plaintiff must show that she is a member of protected class; that she was qualified for, applied for, and rejected for a position; and that non-member of the protected class were treated more favorably. See McDonnell Douglas v. Green, 411 U. S. 792, 802 (1973); Bennum v. Reuters State Univ.; 941 F.2d 154 170 (3d Cir. 1991) (internal citation omitted) If the employee plaintiff cannot make this showing, the employer is entitled to judgment as a matter of law. Pivirotto v. Innovative Systems, Inc.191 F. 3d 344, 352 n. 4 (3d Cir. 1999)

We agree with the District Court that, although Blue fulfills the first two requirements for a prima facie case, she is a member of a protected class and she was not promoted to a position for which she was qualified, she has no provided sufficient facts to meet the third requirement of the test- that similarly situated non-class members were treated more favorably. Blue, thus failed to establish the required "casual nexus between [her] membership in a protected class and the and the decision not to [promoted her]" See Santullo v. United States Postal Service. 352 F. 3d 798 (3d Cir 2003).

In support of her summary judgment motion, Blue submitted excepts from a presentation made at the NAACP Federal Sector Task

Force Breakfast in October 1998, which included statistics related to the overall racial composition of the workforce at DLA/DSCP in the 1990s. Although statistical evidence can be used to prove employment discrimination, it is not irrefutable, and its usefulness "depends on all of the surrounding facts and circumstances." Int'l Bhd. Of Teamster v. United States, 431 U. S. 324, 339-40 (1977). In order to be useful in establishing a prima facie case, statistics must assist the plaintiff in proving discrimination in her particular case. Krodal v. Young, 748 F 2d 701 (D. c Cir 1984).

The statistical reports in Blue's pleadings do not refer to the particular Contract Specialist position she applied for in 1999. Neither do they show the racial or gender composition of the applicant pool or the race or gender of the successful applicants for the position. Blue's statistics are too general to be relevant or useful in establishing a prima facie case of discrimination..

Blue is not required to demonstrate that the position she sought was filled by a non-class member in order to establish a prima facie case See Pivirotto, 191 F. 3d at 352. See also O' Connor v. Consol, Caterers Corp., 517 U. S. 308, 311-12 (1996). Therefore, contrary to Appellee's argument and the District Court's implication, Blue's statement that one of the selectees for the position was a Black Female. " while not supportive of her claim, is not dispositive on the question of discrimination

See e.g.Ezold v. Wolf Block, Schorr and Solis-Cohen, 983 F. 2d 509, 542-43 (3d Cir. 1992) (statistical evidence too general to establish pretext); Molthan v. Temple Univ. of Com. System of Higher Educ., 778 F.2d 955, 963 (3d Cir 1985) (same). In sum, Blue's evidence does not create an inference that her non-selection in 1999 was based on a discriminatory reason. See Teamster, 431 U, S. at 358.

Blue's second challenge on appeal is to the District Court's denial of class certification. We review a decision granting or denying class certification for abuse of discretion. In re LifeUSA Holding Inc., 242 F. 3d136. 143 (3d Cir. 2001). An abuse of discretion is found if the District Court's decision "rests upon a clearly erroneous finding of fact, and errant conclusion of law of an improper application of law to fact". In re General Motors Corp. Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 783 (3d Cir. 1995) (citations and quotations omitted). Although a court should be cautious in making a class certification decision base on its own impression of he merits of a case, some inquiry into the factual and legal issues underlying a plaintiff's cause of action is usually necessary. Newton v. Merrill Lynch. Pierce, Fenner & Smith, Inc., 259 F. 3d 154, 166-67 (3d Cir. 2001).

Four prerequisites must be met to obtain certification of a class: 1) the class is so numerous that the joinder of all members is impracticable; 2) there are questions of law or fact common to the class; 3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and 4) the representative parties will fairly and adequately protect the interests of the class. See Fed R. Civ. P. 23(a). A district court can only certify a class if all four requirements of Rule 23(a) are met. In re Prudential Ins. Of America Sales Practices Litigation. 148 F.3d 283, 308-09 (3d Cir 1998).

We agree with the District Court that Blue cannot fulfill the requirements of Rule 23(a). Even if we were to accept Blue's argument that the first three requirements (9)numerosity,

commonality, and typicality) are met, as a pro se plaintiff, she cannot adequately represent the interests of other class members. See Fymbo v. State Farm Fire & Cas. Co., 213 F. 3d 1320. 1321 (10th Cir 2000). See also C. E. Pope Equity Trust v. United States, 818 F.2d 696, 697 (9th Cir. 1987) (holding that a pro se litigant may not appear as an attorney for others). We further note that, even if Blue were represented by an attorney, she would not "possess the same interests and suffer the same injury" as the class she purports to represent, because she, herself, has not made a prima facie showing of discrimination. See East Texas Motor Freight Systems, Inc. v. Rodriguez, 431 U S. 395, 403-04 (1977). We agree with the District Court that it would be unfair to bind all of the potential class members to the outcome of Blue's case and therefore, find no abuse of discretion in the District Court's denial of class certification.

Blue's next challenges the District Court's amendment of the caption of her complaint by replacing "Defense Logistics Agency/Defense Personnel Support Center" with "Secretary of the Department of Defense Donald H. Rumsfeld," as the sole defendant. The relevant statutory provision governing Title VII suits against the federal government requires that "the head of the department, agency, or unit, as appropriate, shall be the defendant." See 42 U. S. C. 2000e-16c). Blue argues that the caption change was erroneous, because her employer, Defense Logistics Agency, is the entity which allegedly engaged in the discriminatory conduct. Appelle argues that Donald Rumsfeld, as head of he Department of Defense, is the proper defendant. On its face, the statue accommodates both parties' interpretations, as it allows for the head of a department (such as the Department of Defense) or agency (such as Defense Logistics Agency) to be named as the defendant. We note that Blue's interpretation enjoys some support. See e.g., Adams v. E.E.O.C., 932 F Supp. 660, 664, n3 (E. D. Pa. 1996) (Director of Defense Logistics Agency was only proper defendant in a Title VII action); William's v. McCausland, 791 F. Supp. 992, 997 (S. D. N. Y. 1992) (same). We need not delve more deeply into this issue, however, as we conclude that the caption change was neither an abuse of discretion nor relevant to the outcome of Blue's case.

Blue also challenges the District Court's denial of her motion for reconsideration. We review this order for abuse of discretion. See Harsco Corp. v. Zlotnicki, 799 F.2d 906,909 (3d Cir. 1985). The purpose of a motion for reconsideration is to correct manifest errors of law of fact or to present newly discovered evidence. See id The District Court properly denied Blue's motion. We agree that, aside from her new argument that the cases cited by Appelle were invalid because they were "antiquated," Blue's motion did nothing more that restate her previous arguments.

Accordingly, we will affirm the judgment entered by the District Court

APPENDIX B—-MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT OF THE EASTERN DISTRICT OF PENNSYLVANIA FILED JULY 14, 2005

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

Civ. No. 04-2210

BETTY J. BLUE

Plaintiff

v.

DEFENSE LOGISTICS AGENCY,
DEFENSE PERSONNEL SUPPORT CTR.
DLA/DSCP,

Defendants

MEMORANDUM AND ORDER

John P. Fullam Sr, Judge

On June 9, 2004, this Court denied pro se Plaintiff, Betty Blue's motion for summary judgment and granted Defendant, Secretary of the Department of Defense, Donald Rumsfeld's cross-motion for summary judgment. Ms. Blue now moves the court to reconsider. For the following reason, the motion will be denied.

Reconsideration should be granted if the moving party can show: 1.) and intervening change in controlling law, 2) evidence not available when the court entered summary judgment has recently become available, or 3.) there is a need to correct a clear error of law of prevent manifest injustice. See North River Ins. Co., v CIGNA Reinsurance Co., 52 F. 3d 1194, 1218 (3d Cir 1995) The purpose of

reconsideration is not to reargue matters already decided or to relitigate a point of disagreement between the court and the parties. Abu-Jaml v. Horn, No. Civ.A. 99-5089, 2001 WL 1609761 at 89 (E. D. Pa 2001). Ms. Blue's motion to reconsider does little more that restate the arguments she advanced in her motion of summary judgment. She does not present a manifest injustice or any clear errors of law or fact.

In the only new argument raised in her motion to reconsider, Ms. Blue contends that Defendants' cases are inapplicable because they pre-date the Government Employee Rights Act of 1991. This argument fails because the enactment of a statue does not automatically nullify all prior case law.

In her complaint, Ms. Blue failed to allege fact sufficient to establish a claim for employment discrimination. Ms. Blue alleged she and others suffered gender and race discrimination while employed at Defense Supply Center Philadelphia (DSCP), a buying activity of the Defense Logisitics Agency (DLA) under the Department of Defense (DOD). She brought her claim under Title VII of the Civil Rights Act and ask this Court to certify a class including all African American females occupying positions within grade level General Schedule (GS) 6 through GS-12 at the DSCP.

Ms. Blue's claim for failure to promote her to Contract Specialist GS-12 in 1999 is the only claim for which she exhausted all her administrative remedies as required by Title VII. To properly state a claim for employment discrimination under Title VII, a plaintiff must allege: 1) she is a member of a protected class, 2) she was rejected for the position or promotion and 4) individual not of plaintiff's protected class were treated more favorably. See Ezold v. Wolf, Block, Schorr & Solis-Cohen, 983 F. 2d F. 2d 509 522 (3d Cir. 1992).

As an African Amerie~~an female~~, Ms Blue is a member of two protected classes. For present purposes, we can assume her referral for an interview indicates she was qualified for the position. Ms. Blue was not promoted to this position. However, she fails to allege

that the position was given to a similarly situated applicant not of Ms. Blue's protected classes: in fact, Ms. Blue states another African American woman filled one of the two available positions. While Ms. Blue does make several general claims of discrimination, she fails to assert facts upon which a reasonable jury could find in her favor.

Despite Ms. Blue's noble efforts to champion the rights of victims of discrimination, I cannot grant her request for class certification. To be certified, a class must satisfy the following requirements listed in Fed. R. Civ. P. 23 (a): 1) numerosity, 2) commonality, 3) typicality, and 4) adequacy of representation. Once those requirements are met, one seeking class certification must also satisfy one of the requirements of Fed. R. Civ. P 23b).

Ms. Blue has not sufficiently stated her own claim: therefore, she cannot satisfy the commonality and typicality requirements. More significantly, Ms. Blue is acting pro se and cannot adequately represent the class. Despite Ms. Blue's earnest attempts, it would be unjust to bind other members of the proposed class to the efforts of a prose plaintiff.
Because she does not satisfy-the requirements of Fed. R. Civ. P. 23 (a) I need not consider whether she meets on to the Fed./ R. Civ. P. 23(b) requirements.

An Order follows:

ORDER

AND NOW, this 14th day of July 2005, upon consideration of Plaintiff's "Request for Reconsideration", the response thereto, and this Court's decision dated June 9, 2005 is hereby ordered that Plaintiff's motion is DENIED.

s/John P. Fullam, Sr. J.

APPENDIX C—ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING PETITION FOR REHEARING DATED JULY 18, 2006

UNITED STATES COURT OF APPEAL
FOR THE THIRD CIRCUIT

No 05-3585

BETTY J. BLUE

Appellant

v.

DEFENSE LOGISTICS AGENCY,
DEFENSE PERSONNEL SUPPORT CTR.
DLA/DSCP

On appeal From the United States Districts Court
For the Easter District of Pennsylvania
(E. D. Pa. Civ. No. 04-cv-2210
District Judge: Honorable John P. Fullam, Sr.

Submitted Under Third Circuit LAR 34. 1(a)
May 22, 2006

SUR PETITION FOR PANEL REHEARING

Present: McKEE, FUENTES and NYGAAED,
Circuit Judges

The Petition for Rehearing filed by the Appellant in the above-entitled matter, having been submitted to the judges who participated in the decision of this court, and no judge who concurred in the decision having asked for rehearing by this pane, the Petition for Rehearing is hereby DENIED

BY THE COURT,
/s/ Julio M. Fuentes
Circuit Judge